

68636-4

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NO. 68636-4-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

HYON PAK, et al.,

Appellants,

v.

DOMINIC SHIM, et al.,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Sharon S. Armstrong

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Hyon Pak and Respondent Dominic Shim first met in 2003 when Mr. Pak represented Mr. Shim in a legal matter. They soon became good friends and over the following years became involved in investment opportunities together. They became intertwined in real property, stocks, and promissory notes among many other types of investments. However, as the investments turned sour, so did their friendship. Although Mr. Shim knew of the risks involved in these investment opportunities, he filed a lawsuit on February 17, 2010 against Mr. Pak and Ms. Bui (“Appellants”) to seek payment for his losses. After a three day trial, the trial court entered a judgment on March 20, 2012 against Appellants in the amount of \$520,972.00.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in entering the Findings of Fact and Conclusions of Law and Judgment of March 20, 2012 awarding Respondents a total judgment of \$520,972.00.
2. The trial court erred in entering the order of April 11, 2012 denying Appellants’ Motion for Reconsideration.

Issues Pertaining to Assignments of Error

1. Did the court err in entering the Findings of Fact and Conclusions of Law and Judgment and making findings of fact on evidence not in the record when the Respondents failed to prove their case in chief? (Assignment of Error Number 1)

2. Did the trial court err in calculating the award against Appellants when Mr. Shim did not establish he had standing to sue on behalf of corporate entities? (Assignment of Error Number 1 and 2)

3. Did the trial court err in calculating the award against Appellants when two blank checks were admitted for which there was no testimony as to their amounts? (Assignment of Error Number 1 and 2)

4. Did the trial court err in calculating the award against Appellants when Mr. Shim failed to establish the \$30,000.00 purchase of stock? (Assignment of Error Number 1 and 2)

III. STATEMENT OF THE CASE

This matter was tried before the Honorable Sharon Armstrong in King County Superior Court on December 19, 2011. RP 1. Approximately 150 exhibits were admitted into evidence. CP 74-87. Four witnesses testified during the course of the trial

including Plaintiff Dominic Shim, Defendant Hyon Pak and Jae Chang Kim. RP 2.

Mr. Shim's testimony focused on his relationship with Mr. Pak which started in 2003 when Mr. Pak represented him in a DUI case. RP 25-26. Their relationship changed over the years as they became friends and eventually began to invest together. RP 27. Mr. Shim discussed at length the various investments at issue in this case.

The focus of Mr. Jae Chang Kim's testimony was his investment in Etelos stock. RP 203. Mr. Kim confirmed he had never spoken with Mr. Pak regarding the Etelos stock purchase, and he only knew of Mr. Pak because he addressed a check to him for the purchase of the stock. RP 204, 209. All of Mr. Kim's information and conversations regarding Etelos were with Mr. Shim. RP 204.

Mr. Pak described how his relationship developed with Mr. Shim because they had similar interests including gambling. RP 181. Mr. Pak saw Mr. Shim as "that friend that would never do something bad to [him]". RP 227. Because of this friendship, Mr. Pak made loans to Mr. Shim on at least a dozen occasions to support Mr. Shim's gambling habits. RP 268-269. Mr. Pak's

testimony also focused on the investments they pursued including the purchase of Etelos stock. RP 185. Additionally, Mr. Pak explained how he distributed money per Mr. Shim's orders. RP 228.

This litigation stems from a number of transactions which Mr. Pak and Mr. Shim entered into, both jointly and individually, over a period spanning about a year. The transactions at issue include the purchase of a promissory note; the purchase of real property; the purchase of Etelos stock; the creation of a trust; a home equity line of credit; the purchase of a boat; and the sale of College Mart & Laundromat, Inc. Below is a brief timeline of the transactions.

Date	Transaction
Early 2007	College Mart Sale Began
February 2, 2007	Promissory Note Purchased
February 15, 2007	Kingston Property Purchased
March 10, 2007	Etelos Stock First Purchased
March 12, 2007	RAVE Kids Trust Created
May 24, 2007	HELOC Date of Agreement
June 1, 2007	Bayliner Purchased
October 2007	College Mart Sale Closed

1. Purchase of \$63,263.00 Promissory Note

The promissory note was purchased on February 2, 2007.

Exhibit 1. Mr. Shim originally learned of an investment opportunity to purchase a \$63,263.00 promissory note for \$51,500.00. RP 79.

Mr. Shim directed Mr. Pak to meet with the owners of the promissory note to inquire whether it would be a good investment. *Id.* Ultimately, Mr. Shim and Mr. Pak became joint investors in the note. RP 80. When they attempted to collect on the note, they discovered they were unable to do so. *Id.* Mr. Pak then commenced litigation to attempt to collect on their investment. RP 191. As a result, Mr. Pak was required to pay attorney's fees for his attempt to enforce the note. RP 191. The fees were almost \$11,000.00 all of which Mr. Pak paid. RP 192. Even though Mr. Shim was aware of the lawsuit, he never reimbursed Mr. Pak for any of the attorney's fees. RP 193. Neither party disputes the promissory note was paid for jointly, but the trial court concluded Mr. Pak purchased the note "with his own funds" and was "not an obligation of Plaintiff Shim." CP 98.

2. Purchase of the Kingston Property

On February 15, 2007 a purchase and sale agreement was executed for a piece of property located at 24480 Jefferson Place NE, Kingston, WA 98246 ("Kingston Property"). Exhibit 6. The Kingston Property was purchased using cash from both Mr. Shim and Mr. Pak. RP 221. Originally, Mr. Shim and Mr. Pak intended to purchase the property using a trust they created called RAVE

Kid's Trust, but banks had refused to provide the trust with a line of credit since it lacked any assets. RP 40, 221. The Kingston Property was purchased as a vacation home for the exclusive use of Mr. Shim and his family according to Mr. Pak's testimony at trial. RP 218. However, Mr. Shim offered Mr. Pak half of the profits once the house was sold in exchange for Mr. Pak maintaining the property. RP 218. Mr. Pak honored this agreement by making payments to contractors at the direction of Mr. Shim as well as paying for utilities. RP 241-246. Payments for remodeling, upkeep, and utilities were all paid out of a joint account. RP 241-246.

3. Purchase of Etelos Stock

Another investment opportunity for Mr. Pak and Mr. Shim was a "Securities Purchase Agreement" executed on March 10, 2007 for the purchase of Etelos, Inc. ("Etelos"). RP 349-350; Exhibit 84. Etelos was presented as an up-and-coming software company. *Id.* Subsequently, an E-Trade account was set up to facilitate the purchase and transfer of the stock. RP 287. Due to restrictions on the stock, it could not be transferred for 12 months and had to be purchased by an accredited investor. RP 198, 216. At the end of a merger and a reverse stock split they owned over 800,000 shares of stock at \$1.50 a share. RP 215.

During the period of the restrictions, Mr. Shim became anxious about the status of the Etelos stock and requested that Mr. Pak sign letters to E-Trade stating the stock should be transferred. RP 289-290; Exhibit 87, 90, 91. Mr. Pak signed these letters, even though he knew the restrictions were still in place, to show his intention to transfer the stock when it was possible. *Id.* Mr. Pak never authorized the transfer of the Etelos stock from the original E-Trade account, but at some point, Mr. Shim ended up with 411,000 shares of stock which are still in his possession. RP 288, 389.

4. Creation of RAVE Kids Trust

On March 12, 2007, the RAVE Kids Trust, mentioned above, was created by Mr. Pak at the request of Mr. Shim as a means to start estate planning. RP 219; Exhibit 5. The trust was meant to shelter his assets. *Id.* The RAVE Kids Trust never had a bank account since it was created solely for Mr. Shim's use. RP 375. The Kingston Property was transferred to the RAVE Kids Trust on March 12, 2007.

5. Home Equity Line of Credit

Two months later, Mr. Shim signed paperwork for a Washington Mutual Home Equity Line of Credit ("HELOC") to be issued in his individual capacity on May 26, 2007. Exhibit 60. Mr.

Shim's signature appears below a line stating, "By signing below, you agree to the terms of this Agreement and you acknowledge that you have read and received a copy of this Agreement." *Id.* Mr. Shim's signature is also on the Washington Mutual "Authorization for Release of Information" form under "I/WE INTEND TO APPLY FOR CREDIT INDIVIDUALLY". *Id.* Although both Mr. Shim and Mr. Pak withdrew money from the joint account, Mr. Pak only did so for the benefit of Mr. Shim. RP 224. For example, at the direction of Mr. Shim, Mr. Pak withdrew \$275,000 to repay himself for the purchase of the Etelos stock and the expenses for the Kingston Property. RP 224.

6. Purchase of 1993 Bayliner

Another joint investment of Mr. Shim and Mr. Pak's was the purchase of a 1993 Bayliner boat on June 1, 2007. Exhibit 99. The purchase price of \$37,532.75 was paid out of the joint account. RP 299. The moorage for the boat was also paid for out of the joint account. RP 303. Furthermore, Mr. Pak issued the checks for the moorage. RP 84.

7. Sale of College Mart & Laundromat

The sale of College Mart & Laundromat Inc. ("College Mart") began in early 2007 and closed in October 2007. RP 90; Exhibit

119. Mr. Shim was issued two promissory notes totaling \$41,355.02 for a portion of the sale proceeds due to last minute complications with the sale. RP 93-94. Mr. Pak attempted to tender to Mr. Shim the two promissory notes totaling \$41,355.02 and two cashier's checks for the remaining sale proceeds, but Mr. Shim refused these payments. RP 101. Mr. Shim testified at trial he refused to accept the payment because a broker's fee was deducted from the final price. *Id.* at 101, 121. Mr. Shim further stated the fee had not been authorized, but agreed he had previously seen a settlement statement for the sale reflecting a deduction of the broker's fee. *Id.*

Mr. Shim testified at trial that he has yet to receive any of the funds from the sale of College Mart which closed on October 4, 2007. RP 102. He said he had been led to believe the money had been used to pay off the Kingston Property. *Id.* However, the Kingston Property was already paid for in cash and closed on March 12, 2007 seven months earlier. Exhibit 9. Mr. Shim went on to testify he did not know this was a false statement until the end of 2008 when he found out about the HELOC which he signed for in his individual capacity on May 24, 2007. RP 102; Exhibit 60.

8. Exhibits and Testimony Offered at Trial

At trial, Mr. Shim offered Exhibits 20 and 23, which are cashier's checks issued by Key Bank. RP 34-36, 38-39. When offered into evidence, the Appellants objected because the amounts in both proffered checks were blank. *Id.* The court indicated the checks would be admitted conditionally only upon further evidence by Mr. Shim. *Id.* During trial, Mr. Shim never provided further evidence for either check. *Id.* The court's final calculations assumed the amount of each check was \$79,880.01 for a total of \$159,760.02. Exhibits 20, 23. RP 92.

Mr. Shim also produced a carbon copy of a check from Mr. Shim's brother, Mr. Jay Shim, to Mr. Pak for \$30,000 regarding the sale of stock. Exhibit 98; RP 295-296. Mr. Shim directed Mr. Pak to give Jay Shim shares out of Mr. Pak's interest which Mr. Pak did. RP 295-296. However, Mr. Shim presented no other evidence to indicate the check associated with the carbon copy was ever given to Mr. Pak or cashed. Exhibit 98.

After Mr. Shim rested his case, the Appellants moved to dismiss on the grounds that College Mart was not a real party in interest and that Mr. Shim, as an individual, could not sue the Appellants for a corporate claim regarding the \$303,389.83 proceeds from the sale of College Mart or the \$56,076.20 from

Hamni Law Office. RP 404; See RP 29-30, 167. Exhibits 120, 14. The court reserved ruling. RP 170-171. At closing, the Appellants reminded the court of the unresolved motion and the lack of evidence regarding the two blank checks. RP 404. However, no rulings were ever made by the court. *Id.*

In addition, each party produced written damages calculations for final argument. RP 406-407. The court granted additional briefing on those calculations, which was provided by each party on January 3, 2012. RP 407. On January 17, 2012, the court emailed all parties its draft Findings of Fact and Conclusions of Law asking the parties to draft final pleadings and to calculate the payment amounts. See CP 105. The parties could not agree to the Findings of Fact and Conclusions of Law or to the final judgment amount within the boundaries set out in the court's proposed language. CP 105. Each party submitted separate Findings of Fact and Conclusions of Law. *Id.* On March 20, 2012 the court issued a judgment in the amount of \$520,972.00. CP 88-90.

IV. ARGUMENT

1. Standard of Review

Findings of fact are reviewed under a substantial evidence standard. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). “Substantial evidence” is “defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012) (citing *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)). Questions of law and conclusions of law are reviewed de novo. *Kiely v. Graves*, 173 Wn.2d 926, 933, 271 P.3d 226 (2012).

2. The Trial Court Erred in Entering Findings on Evidence Not in the Record When Respondents Failed to Meet Their Burden of Proof So the Trial Court’s Findings Should Be Reversed and the Case Dismissed.

a. Burden of Proof

Generally the burden upon a party in a civil suit is to establish his claim by a fair preponderance of the evidence. See *Haley v. Brady*, 17 Wn.2d 775, 787, 137 P.2d 505 (1943). A higher burden of proof is necessary to prove an allegation of fraud. To prove fraud, each of the nine elements of fraud must be “established by clear, cogent, and convincing evidence.” *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 166, 273 P.3d 965 (2012) (citing *Williams v. Joslin*, 65 Wn.2d 696, 697, 399 P.2d 308

(1965)). Whether the Respondents met their burden is a question of law and should be reviewed de novo.

b. College Mart

“Unless we have the sales documents I don’t know who’s supposed to get the money.” RP 170. These were the trial court’s words at the close of the Respondents’ case in chief. The facts surrounding the sale of College Mart are complex and made increasingly more complicated by the lack of documents as the trial court noted: “I don’t have any escrow instructions. I don’t have the buy-sell.” RP 168. The trial court further questioned, “Who’s supposed to receive the payments from the escrow. I don’t know the answer. We don’t have escrow instructions but also don’t have the buy-sell agreement to document it.” RP 170.

The sale of College Mart was further complicated by Mr. Shim’s failure to pay taxes for several years. RP 14-16. It is unclear how long Mr. Shim did not pay his taxes because he failed to produce copies of his tax returns even after the trial court issued an order compelling production. *Id.* At the closing of College Mart, Mr. Pak discovered that Mr. Shim had not paid taxes in several years. RP 229-230. This created problems for the closing since the lenders required copies of tax returns from both the business

and Mr. Shim individually. *Id.* As a result, in September 2007, Mr. Pak issued a check from the joint account to pay Mr. Shim's taxes for the 2006 tax year. RP 280; Exhibit 143.

Even though the testimony and evidence were confusing, both parties agree Mr. Pak attempted to tender the proceeds of the sale to Mr. Shim. RP 101, 121. The parties differ as to why the proceeds never transferred possession. Mr. Shim testified he refused to accept the proceeds because a \$30,000 brokerage fee had been withheld even though he had previously seen the settlement statement with the brokerage fee included. *Id.* Mr. Pak testified he paid out the funds as directed by Mr. Shim. RP 268.

i. Conversion

The Respondents allege Mr. Pak committed conversion in relation to College Mart by interfering "with his right to his money from October, 2007 up to the present time." CP 17. Mr. Pak did not commit conversion because he never interfered with Mr. Shim's possession of his property or access to his funds.

Conversion is committed when a person is deprived of possession of any chattel without lawful justification by the willful actions of another person. *Westview Investments, LTD. v. U.S. Bank*, 133 Wn. App 835, 852, 138 P.3d 638 (Div. 1 2006) (citing

PUD Util. Dist. No. 1 of Lewis County v. Wash. Pub. Power Supply Sys., 104 Wn.2d 353, 705 P.2d 1195 (1985)). Money can only be the subject of conversion in two cases. 133 Wn. App at 852. The first instance is where money is wrongfully received by the party charged with conversion. *Id.* The second is when a party has the obligation to return the specific money to the party claiming it. *Id.*

The Respondents have failed to prove a case of conversion by the preponderance of the evidence. In looking first to whether Mr. Pak wrongfully received money, neither party alleged Mr. Pak wrongfully received the funds from the sale of College Mart since he was acting as Mr. Shim's agent. See RP 101, 268; 133 Wn. App at 852. Mr. Pak assisted with the sale of College Mart at the request of Mr. Shim. RP 262. Furthermore, Mr. Pak negotiated the price for the sale because of the disparity in price. RP 263. Mr. Pak did not receive a direct payment for the negotiation he did on behalf of Mr. Shim and instead was given a brokerage fee for the work he completed. *Id.* Moreover, the agreed upon amount, \$30,000, was identified in the settlement statement which Mr. Shim viewed prior to the sale of College Mart. *Id.* Therefore, the payment to Mr. Pak for the services he provided cannot be the basis for conversion.

There also cannot be a claim for conversion based on Mr. Shim's failure to accept the promissory note from the sale. The payment for College Mart was made with cash and two promissory notes in the amounts of \$21,335.02 and \$20,000. RP 264. Mr. Shim did not directly receive the promissory notes, but he did receive the proceeds from the sale because he used a portion of it to reimburse Mr. Pak for an advance for Mr. Shim's gambling. RP 263-264. The remainder of the proceeds was deposited into the joint account at the direction of Mr. Shim. RP 268. Mr. Pak was acting as an agent for Mr. Shim and disbursing the funds for the sale of College Mart at his direction, therefore Mr. Pak did not wrongfully receive money from the sale of College Mart.

A claim of conversion likewise fails under the second option because under both Mr. Shim and Mr. Pak's versions of the story, Mr. Pak did attempt to give the funds to Mr. Shim. *Id.* However, Mr. Shim needed money for a gambling trip to Las Vegas, Nevada in December 2007, which was shortly before the two promissory notes became due. RP 264-265. Mr. Shim directed Mr. Pak to use the \$20,000 promissory note to reimburse himself for the advance he provided to Mr. Shim for gambling in Vegas. RP 266. The other note was deposited into the joint account at Mr. Shim's direction. *Id.*

The remaining proceeds of the sale were deposited into the joint account to fund the additional purchase of Etelos stock and maintenance of Mr. Shim's real property. RP 268. Mr. Pak could not have committed conversion under this second option because he disbursed the funds per Mr. Shim's direction thus preventing him from failing to return funds.

ii. Fraud

Mr. Pak distributed the proceeds from the sale of College Mart at the direction of Mr. Shim and thus did not make a misrepresentation about his intention to fulfill his duty as Mr. Shim's agent. To establish a claim of fraud, the plaintiffs have the burden of proving all of the following nine elements by clear, cogent, and convincing evidence:

- (1) a representation of existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity, (5) the speaker's intent that it be acted upon by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom the representation is addressed, (7) the latter's reliance on the truth of the representation, (8) the right to rely upon it, and (9) consequent damage.

174 Wn.2d at 166. At trial, the Respondents claimed Mr. Pak made a misrepresentation of a fact and thus committed fraud because he "falsely represented his intention to fulfill his duty as an escrow

agent to transfer the funds.” RP 395. Mr. Pak did represent to Mr. Shim that he would act as his agent and to negotiate the sale price of College Mart which could satisfy the first element. RP 262. However, Mr. Pak fulfilled his duty, and therefore the statement was not a misrepresentation. Thus the remaining elements of the fraud claim have not been met.

For example, Mr. Pak did not make a false statement about his ability to act as Mr. Shim’s agent. In fact, he went beyond what was required by advancing Mr. Shim gambling money and paying funds as directed by Mr. Shim. RP 264-266, 268. Mr. Pak’s compliance with Mr. Shim’s requests demonstrates that elements three through seven were not met. No additional evidence was offered at trial to establish these elements. Lastly, Mr. Shim was not damaged by directing Mr. Pak to distribute his money in a specific way; if anything, he reaped the benefit of having an advance for gambling and another person make payments on his bills. The Respondents failed to prove all nine of the elements of fraud by clear, cogent and convincing evidence.

iii. Breach of Fiduciary Duty

The Respondents failed to establish a claim for breach of fiduciary duty because Mr. Pak fulfilled his responsibilities to Mr.

Shim. To establish a breach of fiduciary duty, the plaintiff must prove that: (1) a fiduciary duty gave rise to a duty of care on the part of the defendant; (2) there was an act or omission by the fiduciary in breach of the standard of care; (3) the plaintiff sustained damages; and (4) the damages were proximately caused by the fiduciary's breach of the standard of care. 29. Wash. Prac., Elements of an Action §12.1.

The Respondents alleged in the Complaint that Mr. Pak failed to fulfill his duties by refusing to provide Mr. Shim with the proceeds from the sale of College Mart. CP 14-15. For the reasons stated above, there is no evidence to support this claim. Mr. Pak deposited the proceeds of the promissory notes and two cashier's checks into the joint account and made payments from the account at the direction of Mr. Shim. RP 264-266, 268. Mr. Shim reaped the benefit of Mr. Pak's advancement of gambling funds and disbursement of payments at the direction of Mr. Shim. *Id.* The Respondents failed to meet their burden of proof because Mr. Pak acted at the direction of Mr. Shim.

c. Home Equity Line of Credit ("HELOC")

"I mean, what I'm struggling with is the fact that there are no documents. And it's one thing to say well, WAMU was purchased

by Chase. But I mean, good heavens, people keep documents.”
RP 225. As the trial court clearly noted, one of the issues with
sorting through this case is the lack of documentation by both
parties. *Id.*

With regards to the HELOC, there is some documentation
which provides some guidance. Mr. Shim contracted with
Washington Mutual for a HELOC in the amount of \$450,000.
Exhibit 60. Page nine of the “WaMu Mortgage Plus Agreement and
Disclosure” only bears Mr. Shim’s signature. *Id.* The signature
appears below a line stating “By signing below, you agree to the
terms of this Agreement and you acknowledge that you have read
and received a copy of this Agreement.” *Id.* Mr. Shim confirmed at
trial that the signature was his. RP 53-54. Mr. Shim’s signature
also appeared on Washington Mutual’s “Authorization for Release
of Information” under a line bold and all capital letters that read
“I/WE INTEND TO APPLY FOR CREDIT INDIVIDUALLY”. Exhibit
60. Again, Mr. Shim verified it was his signature on the form. RP
53-54. The proceeds of the HELOC were deposited into a
Washington Mutual Account which both Mr. Shim and Mr. Pak had
access to. RP 58. The purpose of the HELOC was to reimburse

Mr. Pak for the payments he had made towards the Kingston Property and to provide Mr. Shim with cash. RP 311.

At the conclusion of the trial, Mr. Shim was unable to produce any evidence to show Mr. Pak obtained the HELOC without his knowledge. See RP 53-54, 58, 311. There is evidence Mr. Shim signed for the HELOC in his individual capacity. Exhibit 60. This was not Mr. Shim's first time signing loan paperwork as he was a businessman who had previously applied for loans. RP 109.

i. Conversion

The Respondents allege Mr. Pak committed conversion by "receipt and possession of funds from a line of credit" even though the evidence shows Mr. Shim took out the HELOC in his individual capacity. CP 18; Exhibit 60. The property at issue for conversion is money, and as reference above, this means there are two ways conversion can be committed. See *infra* p. 12; 133 Wn. App at 852.

To establish conversion under the first option, the Respondents would have had to prove Mr. Pak wrongfully received money. *Id.* Mr. Shim was the sole signer on the HELOC documents including the "WaMu Mortgage Plus Agreement and Disclosure" where the bank account for the HELOC funds is designated as the joint account. Exhibit 60. The "Line of Credit

Initial Draw Request” transferring the funds to a separate account was also solely signed by Mr. Shim. Exhibit 60; RP 57. The “Line of Credit Initial Draw Request” deposited the funds from the HELOC into a joint account which both Mr. Shim and Mr. Pak had access to. Furthermore, Mr. Pak transferred funds out of the HELOC to pay for Etelos stock and the Kingston Property at the direction of Mr. Shim and for his benefit. RP 224.RP 58. Therefore, Mr. Pak did not wrongfully receive funds because Mr. Shim deposited the funds into an account which Mr. Pak had access to, and Mr. Pak used funds at the direction of and for Mr. Shim’s benefit. Exhibit 60; RP 57-58.

The second option for establishing a claim of conversion with money is when a party has the obligation to return the specific money to the party claiming it. 133 Wn. App at 852. Again, it is unclear how Mr. Pak would have committed conversion when Mr. Shim deposited the funds into a joint checking account. Exhibit 60; RP 57. Mr. Pak did remove funds from this account, but he did so at the direction of Mr. Shim and for his benefit. RP 57-58. Mr. Pak used the funds to reimburse himself for the purchase of Etelos stock for Mr. Shim and for payments on the Kingston Property. RP 57-58.

ii. Fraud

The Respondents had the burden to prove Mr. Pak committed fraud by establishing every element of fraud by “clear, cogent, and convincing evidence.” 174 Wn.2d at 166. The elements for fraud were previously stated. See *infra* p. 15; 174 Wn.2d at 166. There cannot be a claim for fraud without a misrepresentation of a material fact. 174 Wn.2d at 166.

The Respondents allege Mr. Pak committed fraud because he “knowingly made false representations to Mr. Shim regarding the line of credit from Chase Bank.” CP 18. At trial, Mr. Shim testified he was unaware the HELOC existed until he received a call from Washington Mutual towards the end of 2008. RP 49-50. He made this claim despite the bank statements being sent to “Dominic Shim, 24480 Jefferson PL NE, Kingston WA 98346-9213” starting in May 2007. Exhibit 61. This is the same address specified on the “WaMu mortgage Plus Deed of Trust” which only bears Mr. Shim’s signature under a line stating “By signing below, you agree to the terms of this Agreement and you acknowledge that you have read and received a copy of this Agreement.” *Id.* Mr. Shim confirmed at trial the signature was his. RP 53-54. Therefore, the evidence does not support a finding that Mr. Shim was unaware

of the HELOC until the end of 2008 because of a misrepresentation by Mr. Pak.

Further, Mr. Shim deposited the funds into a joint checking account. Exhibit 60; RP 58. Mr. Pak did remove funds from this account, but he did so at the direction of Mr. Shim and for his benefit. RP 224. Mr. Pak used the funds to purchase Etelos stock for Mr. Shim and for the Kingston Property. RP 57-58. Mr. Pak also had a legal right to access the funds, so merely removing funds would not support a finding of fraud.

Even if the court somehow found there was a misrepresentation, the claim for fraud would still fail because there was no "consequent damage." *Id.* Mr. Pak removed the funds from the HELOC for the benefit of Mr. Shim. RP 224. The funds were used to cover the cost of the Etelos stock and the Kingston Property. RP 224. Even the trial court found the removal of the funds was for the benefit of Mr. Shim. CP 100.

iii. Breach of Fiduciary Duty

As discussed above, there can be no breach of fiduciary duty without an actual fiduciary duty being present. *See infra* p. 16-17; 29. Wash. Prac., Elements of an Action §12.1. It is unclear what duty Mr. Pak owed to Mr. Shim in regards to the HELOC since

Mr. Shim was the sole signer on the documents to acquire the HELOC. RP 53, 54; Exhibit 60. The Respondents did not allege any duty at trial or in the Complaint. See RP and CP 19-20. The Complaint states Mr. Pak “breached his duties to Mr. Shim by liquidating the line of credit in his name from Chase Bank” but it is unclear what duty he had to Mr. Shim in this regard. CP 20. Without a duty, there can be no breach of fiduciary duty.

Even if the Respondents had established a duty by the preponderance of the evidence, Mr. Shim did not sustain damages from Mr. Pak’s involvement in the HELOC because all of the funds Mr. Pak removed were used for the benefit of Mr. Shim. RP 224. The funds from the HELOC were placed into a joint checking account which both Mr. Shim and Mr. Pak had access to. Exhibit 60; RP 58.

d. Etelos, Inc. Stock

The trial court stated, “...it is a bench trial and I mean, it’s what I’m struggling with. Trying to make sense of what really happened and what the parties really intended.” RP 226. Both Mr. Shim and Mr. Pak invested in Etelos which was presented to them as an up-and-coming software company. RP 349-350. Mr. Pak had to purchase the stock in his own name because of restrictions

on the stock requiring it to be purchased by an accredited investor. RP 216. The stock also had restrictions that it could not be transferred for 12 months. RP 198. At the end of a merger and a reverse stock split, Mr. Shim and Mr. Pak owned over 800,000 shares of stock valued at \$1.50 per share. RP 215. Their understanding was each of them owned half. RP 216. Both Mr. Shim and Mr. Pak testified the purchase price per share after the end of a merger and a reverse stock split was \$1.20 per share and the shares were valued at \$1.50 per share. RP 70, 215.

An E-Trade account was set up to facilitate the purchase and transfer of the stock. RP 287. Mr. Pak never authorized the transfer of stock from this account, but at some point Mr. Shim ended up with 411,000 shares of stock. RP 288. He is still in possession of those shares. RP 389. Prior to Mr. Shim obtaining the 411,000 shares, he was very anxious about the status of the stock and asked Mr. Pak to sign several letters to E-Trade authorizing the transfer of the Etelos stock. RP 289-290. Even though the stock was not yet transferable, Mr. Pak signed the statements to confirm his intention of transferring the stock once it was possible. *Id.*

i. Breach of Fiduciary Duty

The Complaint alleges Mr. Pak breached his fiduciary duty to Mr. Shim by “improperly holding and failing to provide an accounting” for the purchase of Etelos stock. CP 20. Mr. Pak acted at the direction of Mr. Shim. RP 289-290. He even signed several letters to E-Trade to confirm his intention of transferring the stock once it was possible. *Id.* The stock had not become transferrable yet and therefore an accounting could not be provided of the purchase of the stock. *Id.* As a result, there was not an improper holding and failure to provide an accounting and no breach occurred.

e. Kingston Property

The trial court noted, “[a]nd because there’s no documents, you know, there’s nothing to really verify what your intent was at the time. I mean, it’s, it’s pretty hard to figure out who’s really telling the truth.” RP 227. The trial court’s ruling pertaining to the joint ownership of the Kingston Property should be reviewed de novo because it is a conclusion of law. The findings of fact regarding Mr. Shim and Mr. Pak’s shared responsibility for the Kingston Property are reviewed under the substantial evidence standard.

The Kingston Property was purchased as a vacation home for Mr. Shim and his family. RP 372. It was purchased on

February 15, 2007 by Hyon Pak and transferred to the RAVE Kids Trust on March 12, 2007. Exhibit 8. At trial, Mr. Shim stated “I asked him to do it that way” in response to a question about why the house was put in the name of the RAVE Kids Trust. RP 132. It was necessary to put the house in the name of the RAVE Kids Trust because Mr. Shim had not filed taxes. RP 337. If the property had been in Mr. Shim’s name, he would have had complications selling the property in the future because he did not file taxes. RP 337-338.

In addition to being a vacation home, the Kingston Property was also meant to be an investment property because when it was purchased in 2007 the price of real estate was continuing to go up indicating it to be a good investment. *Id.* Mr. Shim offered Mr. Pak half of the profits once the house was sold in a few years in exchange for Mr. Pak maintaining the property. RP 218. Payments for remodeling, upkeep, and utilities were all paid out of the joint account. RP 241-246. These payments were issued by Mr. Pak which supports his testimony that he was responsible for the maintenance of the house. RP 218, 241-246.

Mr. Pak should have been reimbursed for his contributions for the purchase and maintenance of the house rather than being

held responsible for half of the purchase price. Therefore, the \$145,016.50 should not be included in the judgment amount, and Mr. Pak should be credited for his expenditures of \$141,683.23. The Kingston Property should be the sole responsibility of Mr. Shim.

f. Legal Malpractice

To establish legal malpractice a plaintiff must prove: the existence of an attorney-client relationship that gives rise to a duty of care on the part of the defendant; an act or omission breaching that duty of care; damage to the plaintiff; and that the damages were proximately caused by the breach of the duty of care. *Ang v. Martin*, 154 Wn.2d 477, 481, 114 P.3d 637 (Wash. 2005) (citing *Hizey v. Carpenter*, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992)). The duty of care required in a legal malpractice case must normally be established by the testimony of an attorney. *Walker v. Bangs*, 92 Wash.2d 854, 601 P.2d 1279 (1979).

The Respondents failed to establish an attorney-client relationship existed throughout the course of the transactions in dispute. As Respondents' counsel said in his closing, "Where is the documentation? Where is the accounting? Where is the proof? There just isn't any." RP 382. In fact, Mr. Shim even testified that Mr. Pak stated he could no longer be Mr. Shim's attorney once he

became an escrow agent for the College Mart transaction. RP 91. Mr. Pak's testimony at trial supported this when he said "I told him I can't be involved with that as a legal representative. And he said yeah, he knew." RP 181. There is further evidence an attorney-client relationship did not exist because Mr. Shim and Mr. Pak never communicated about fees. RP 309. If Mr. Pak had been acting as Mr. Shim's attorney, there would have been payment of attorney's fees. No evidence was presented at trial to establish attorney's fees were paid to Mr. Pak. *Id.* The only discussion of Mr. Pak's attorney's fees was when he testified there was no expectation Mr. Shim would be paying him fees because he was not acting in the capacity of an attorney. *Id.* Without the presence of an attorney-client relationship, there cannot be legal malpractice.

Furthermore, due to the practice of law being a highly specialized field, it is often necessary to have expert testimony to determine whether an attorney breached their duty of care. *Geer v. Tonnon*, 137 Wn. App. 838, 155 P.3d 163 (Div. 1 2007) (citing *Lynch v. Republic Publ'g Co.*, 40 Wn.2d 379, 243 P.2d 636 (1952)). The Respondents did not have any experts testify at trial. There simply cannot be a claim for legal malpractice when a duty of care is never established. See 154 Wn.2d at 481.

The evidence presented did not meet the necessary burden of proof. By Mr. Shim's own testimony, no attorney-client relationship was expected or existed when the transaction at issue took place. Therefore, Mr. Pak did not have an attorney-client relationship with Mr. Shim and did not commit legal malpractice.

3. Funds from The Sale Of College Mart Should Not Have Been Included in the Total Recovery.

a. College Mart Is Not A Real Party In Interest.

The sale of College Mart should not be included in the recovery as a matter of law because College Mart is not a real party in interest. Therefore, the issue should be reviewed de novo.

Every action shall be prosecuted in the name of the real party in interest. CR 17(a). A person is not a real party in interest unless he or she has a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and he must show that he will be benefited by the relief granted. See *Triplett v. Dairyland Ins. Co.*, 12 Wn. App. 912, 532 P.2d 1177 (1975). The modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as *res*

judicata. FRCP 17(a) advisory committee note (1966).¹ CR 17(a) is meant to ensure the real party in interest will be made a party to the suit at a time when the interests of the defendants will be protected and is intended to protect the defendant from prejudice by insuring a claim is prosecuted by the proper party. *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 226-227, 734 P.2d 533 (1987).

At no time during this action did Mr. Shim name College Mart as a plaintiff. CP 13. Instead, Mr. Shim pursued the corporate claims against the Appellants in an individual capacity. *Id.* As an individual, Mr. Shim did not have a present and substantial interest in the claim against Appellants. The benefit of the recovery regarding the sale could only be for the sole benefit of College Mart and not Mr. Shim individually. The corporate claims against the Appellants were prosecuted by the wrong party and should not have been included in the recovery amount calculation.

- b. Mr. Shim Cannot Sue As An Individual For A Corporate Claim.

¹ Since the test for CR 17(a) is identical to its federal counterpart, federal court interpretations of the corresponding federal rule are persuasive authority for interpreting the state rule. See *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 734 P.2d 533 (1987).

The sale of College Mart should not have been included in the recovery as a matter of law because Mr. Shim sued as an individual for a corporate claim. Therefore, the issue should be reviewed de novo.

A stockholder, as such, cannot maintain an action against a third person, either for breach of a contract between such third person and the corporation of which he is a stockholder, or for an injury to the corporation or its property. *Ninneman v. Fox*, 43 Wn. 43, 45, 86 P. 213 (1906) (questioned in *Hunter v. Knight*, 18 Wn. App. 640, 571 P.2d 212 (1977) on other grounds). All such wrongs must be addressed by the corporation, in the corporate name. *Id.* The fact that the complaining stockholder has become the owner of all the capital stock, or that the corporation has done no business for a number of years and has no property excepting the claim sued upon, does not enlarge his rights in this respect. *Id.* at 46. A shareholder who owns all or practically all of a corporation's stock is not entitled to sue as an individual because the shareholder "cannot employ the corporate form to his advantage in the business world and then choose to ignore its separate entity when he gets to the courthouse." *Zimmerman v. Kyte*, 53 Wn. App. 11,12, 765 P.2d

905 (1988) (citing 12B W. Fletcher, *Private Corporations* § 5910 (1984)).

Mr. Shim should have been precluded from recovering any amounts from his claim against the Appellants regarding the sale of College Mart because he failed to bring his claim in a corporate capacity. In *Zimmerman*, the plaintiffs filed suit, naming themselves and their corporation. When the defendant challenged their standing as individuals named in the suit, the plaintiffs moved to substitute themselves as plaintiffs in place of the corporation, averring that the corporation had been voluntarily dissolved and the corporation had transferred its rights to them, and the defendant made no objection. The court found that there was substantial evidence that supported a transfer of the cause from the corporation to the plaintiffs based on a theory of assignment or administrative dissolution.

Unlike the plaintiffs in *Zimmerman*, Mr. Shim provided no evidence to the court why he should be allowed to sue in an individual capacity and made no attempt to sue in a corporate capacity. CP 13. Even if Mr. Shim is the only shareholder in College Mart or if the corporation had not done business in a number of years, he did not have the right to sue in an individual

capacity for an injury to the corporation. In this case, Mr. Shim took the advantages of the corporate entity while discarding any inconveniences by failing to bring the corporation as a real party in interest. Therefore, the College Mart claim against the Appellants in the amount of \$521,707.40, which were the proceeds from the sale of the business, should not have been included in the award amount calculations.

4. The Check from Hanmi Law Offices Should Not Have Been Included in the Total Recovery.

The check from Hanmi Law Offices should not have been included in the recovery as a matter of law because Wenatchee Group Inc. is not a real party in interest and Mr. Shim sued as an individual for a corporate claim. Therefore, the issue should be reviewed de novo.

As discussed above, every action shall be prosecuted in the name of the real party in interest and a shareholder who owns all or practically all of a corporation's stock is not entitled to sue as an individual. See *infra* p. 30-31; 43 Wn. at 45. Under those same principles, the check from Hanmi Law Offices labeled "Wenatchee Group Inc." should not be included in the total recovery because it represents corporate funds. Mr. Shim failed to bring Wenatchee

Group Inc. as a real party in interest in this case or prove he had authority to sue on its behalf. CP 13. Instead he sued as a private individual for the corporate claim. *Id.* Mr. Shim provided no evidence to the trial court why he should be allowed to sue in an individual capacity and made no attempt to sue in a corporate capacity. CP 13. See RP 29-30. Mr. Shim took the advantages of the corporate entity while discarding any inconveniences by failing to bring Wenatchee Group Inc. as a party in this case. Therefore, the check to from Hanmi Law Offices to Wenatchee Group Inc. of \$56,076.20 should not have been included in the award calculations.

5. The Checks that were Conditionally Admitted Should Not Have Been Part of the Recovery Calculation.

The findings of fact for the Key Bank checks are reviewed under the substantial evidence standard. The conditionally admitted checks offered by the Respondents during trial fail to meet the substantial evidence standard because the checks would not persuade a rational fair-minded person the recovery amount should be increased. During trial, Mr. Shim introduced two blank Key Bank checks as Exhibits 20 and 23. RP 34-35, 38-39. The checks were to be admitted only on the condition that evidence would be offered

to link the checks to Mr. Shim's claimed \$159,760.02 amount. *Id.* Mr. Shim failed to offer any testimony or any other evidence on the amount of each blank check despite clear instructions from the court to do so. *Id.* He had more than ample time to request further documents from his bank regarding the refinance of his home that would establish the values of those remaining checks, but he failed to do so. If such evidence existed, it would have been easily accessible to him. Although addressing authentication, ER 1002 and 1004 provides guidance as to why Mr. Shim should have offered originals.

Evidence Rule 1003 addresses the ability to produce duplicates.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) *in the circumstance it would be unfair to admit the duplicate in lieu of the original.*

(Emphasis added). In this case, only copies of the original checks with dollar amounts would show it was negotiated and for what amount. Without the original checks, not only are the amounts unknown, but there is no evidence to show whether they were cashed. The blank checks only provide evidence someone had begun to fill out the checks, and do not provide evidence the

checks were negotiated or cashed. Here, no testimony or any other evidence was ever offered that would cause \$159,760.02 to be included in the recovery calculation. Therefore, the \$159,760.02 attributed to the blank checks should not have been included in the recovery calculation.

6. Mr. Jay Shim's Check for the Purchase of Stock Should Not Have Been Part of the Recovery Calculation.

The trial court noted, "Well, with respect to the funds from the brother, I don't really think he's the real party in interest." RP 169. The findings of fact for Mr. Jay Shim's check are reviewed under the substantial evidence standard. Mr. Jay Shim's check offered by the Respondents during trial does not meet the substantial evidence standard because the check would not persuade a rational fair-minded person the recovery amount should be increased.

At trial, Mr. Shim produced a carbon copy of a check from Mr. Jay Shim for impeachment purposes only and not to establish payment was really made. Exhibit 98; RP 295-296. There was no evidence the check associated with the carbon copy was ever given to Mr. Pak or cashed. RP 294-296; *See Id.* at 130. At trial, Mr. Shim even states he does not recall in what form his brother

gave him these alleged funds to purchase stock. RP 130. Mr. Shim directed Mr. Pak to give Jay Shim stocks from Mr. Pak's own shares. RP 294-296. Mr. Pak complied with his request. *Id.* During trial, Mr. Shim failed to introduce evidence Mr. Pak was paid for those shares. RP 294-296; *See Id.* at 130. However, Mr. Shim calculated Mr. Pak owed \$30,000 from the sale of stock to his brother.

Evidence Rule 1003, as stated above, is applicable to the carbon copy of Mr. Jay Shim's check as well. In this case, only a copy of the cancelled check would show it was negotiated as well as to whom and when. Without the original cancelled check, the only thing known is at some point in time, someone filled out a check that caused a carbon copy. Therefore, the \$30,000 indicated on the carbon copy of a check should not have been included in the recovery calculation.

7. The Order Denying The Motion For Reconsideration Should Be Reversed.

On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may

be vacated and reconsideration granted. CR 57(a). A Motion for Reconsideration may be granted when there is error in the assessment of the amount of recovery, whether too large or too small, when the action is upon a contract, or for the injury or detention of property that materially affects the substantial rights of a party. See CR 57(a)(6).

As discussed above, there is error in the assessment of the amount of recovery. Due to the lack of documentation and the inability to determine the true intent of the parties, an accurate calculation of the recovery amount was impossible. The trial court erred in denying the Appellants' Motion for Reconsideration and the ruling should be reversed.

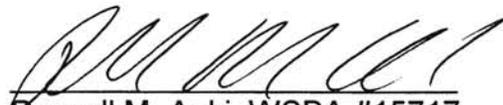
V. CONCLUSION

The trial court erred by not dismissing the Respondents' case for failure to meet its burden. This Court should reverse the trial court and dismiss the case. In the alternative, the trial court erred in its Findings of Fact and Conclusions of Law and Judgment recovery calculations and by denying the Appellants' Motion for Reconsideration. This Court should remand with an order that the trial court strike the unsupported findings and conclusions and reverse the judgment in favor of the Appellants. The recovery

amount should be recalculated to reflect the striking of the
unsupported findings.

Dated this 25th day of September 2012.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

DOMINIC SHIM,)	
)	No. 68636-4-I
Respondent,)	
)	
v.)	
)	
HYON PAK et. al.,)	CERTIFICATE OF SERVICE
)	
Appellants,)	
)	

I certify that on the 25th day of September, 2012, I caused a true and correct copy of the Brief of the Appellant to be served on the following in the manner indicated below:

Counsel for respondents	<input checked="" type="checkbox"/> U.S. Mail
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